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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 113

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner,

v.

R. L. BRYANT, Administrator of M. L. Bryant, Deceased, Respondent.

REPLY BRIEF OF RESPONDENT'S ATTORNEY TO PETITIONER'S BRIEF ON THE MERITS OF THE CASE.

CHARLES CURRY,
For Respondent.

R. B. STEPHENSON,
CURRY CARTER,
Of Counsel.

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REPLY BRIEF OF RESPONDENT'S ATTORNEY TO PETITIONER'S BRIEF ON THE MERITS OF THE CASE.

I.

Learned Counsel for the Defendant, in His Statement of the Evidence, Does Not Seem to Appreciate, That This Case Stands on Defendant's Demurrer to the Evidence.

(The petitioner is referred to in this brief as the defendant, the respondent as the plaintiff, and the deceased as Bryant.)

Counsel for the defendant, when stating the evidence relating to Bryant's discharge from defendant's employment, in the petition, and, in his briefs, appears to have lost sight of the fact that this case stands on the defendant's demurrer to the evidence. He has presented the evidence in the most favorable light for the defendant, and as if the defendant were the demurree, instead of the demurrant.

The familiar law applicable to demurrers to the evidence is stated in the case of Duncan v. Carson, 127 Va., p. 319-320 thus:

> "On a demurrer to the evidence, the demurrant is considered as admitting the truth of all his adversary's evidence and all just inferences that can be properly drawn therefrom by the jury, and as waiving all his own evidence which conflicts with that of his adversary or which has been impeached, **and all inferences from his own evidence** (although not in conflict with his adversary's) which do not NECESSARILY result therefrom. This admission **embraces the credibility of the demurree's witnesses and the existence of all facts which demurree's evidence (which includes testimony) conduces to prove,** or which may be reasonably **inferred** from his whole evidence, direct and

> circumstantial; and, if several inferences may be drawn from that evidence, differing in degrees of probability, **the court must adopt those most favorable to the demurree,** provided they be not forced, strained, or manifestly repugnant to reason." (Italics supplied.)

Defendant's counsel has disregarded altogether the testimony of Dodson, defendant's section foreman, and the testimony of defendant's witness, Mr. Crance, **that Bryant was discharged on Saturday, two days before the shooting complained of** (R. 84-85 & 141); and see the opinion of Judge Burks (R. 165-166).

The Court under the demurrer to the evidence was required to take the view of the evidence **most favorable to the plaintiff,** and the defendant cannot be heard to question the **credibility of plaintiff's witnesses, or, the facts that defendant's evidence tends to show.**

The defendant elected to submit the question as to whether Bryant was in the employment of the defendant, at the time of the shooting, to the court, on its demurrer to the evidence. The court was therefore bound to take the view of the evidence most favorable to the plaintiff. It cannot be denied that there is evidence upon which a jury might have found that Bryant was not in the employment of the defendant, and had been discharged two days before he was shot, and the court was bound to so find, and did so find.

As said by the Virginia Court in the case of Addington v. Guest River Coal Co., 130 Va. 584-604:

> "The rule of consideration on demurrer to the evidence is succinctly stated in Milton v. N. & W. Ry. Co., 108 Va. 763, 62 S. E. 961: 'If upon demurrer to the evidence, **the evidence is such that the jury might have found a verdict for demurree, the court must so find,** and give judgment in his favor, and further, **if reasonably fair-minded men might differ upon a question,** such a question must be decided against demurrant."

If the question of fact, as to whether or not Bryant had been discharged on the Saturday before he was shot, had been submitted to a jury, and the jury had found as the court has found on the demurrer to the evidence, could any one plausibly contend in this court that the finding of the jury was not final on the evidence, as it appears in the record? The defendant preferred to submit that question to the courts, and is not the finding made by the state courts final, and conclusive, as against the defendant? See Dower v. Richards, 151 U. S., 658, and cases cited in our brief opposing writ of certiorari, p. 3.

The evidence shows clearly that Bryant had been discharged from the defendant's employment two days before the tragedy; **and if there is any**

evidence in the record to the contrary, it was waived by the defendant; and as the case stands on its demurrer to the evidence, there is not a **scintilla** of evidence that brings this case under the Federal Act, and the statements of facts in defendant's petition and in the briefs of its counsel **are entirely misleading.**

As said by Horace, **"Decipimur specie recti."**

II.

Erroneous View of the Law Taken by Defendant's Counsel.

Defendant's counsel, from the beginning of this case, has, apparently, proceeded upon the theory that by mere pleading facts, as by defendant's special plea, R. 22, that bring this case under the purview of the Federal Employers' Liability Act, is sufficient to give Federal Courts jurisdiction under that statute. If that is true, any case for personal injury against an **intrastate** railroad might be brought under the jurisdiction of the Federal Courts. A case cannot ordinarily be brought under the scope of the Federal Employers' Liability Act, by mere averments. To give this court jurisdiction under that act, the burden was on the defendant to show: first, that it was a common carrier by railroad, engaged in commerce between the states; and, second, that Bryant, at the time he was shot, was in the employment of defendant, in such commerce. N. C. R. Co. v. Zachary, 232 U. S. 256, 58 L. Ed. 594.

It was admitted in the beginning, by the plaintiff, that the defendant was a common carrier by railroad, engaged in commerce between the states, but the plaintiff denied that Bryant, at the time he was shot, was in the employment of the defendant, in interstate commerce, and this issue was pointedly made by the pleadings, R. 22, 24, that we have referred to in our opening brief on motion to dismiss, pp. 8 and 9. It will be seen from the record, that the defendant made no effort to elicit evidence from its witnesses to support its special plea, and in fact, showed by its witness, Mr. Crance (R. 141), that he had directed Dodson to discharge Bryant on Saturday, two days before the shooting occurred. That the defendant relied alone on its plea to bring this case under the Federal Statute is obvious, as we believe from the admissions that it made in its demurrer to the evidence (R. 160-161), that Bryant had been discharged **"from the defendant's employment on Saturday, prior to the Monday, of the shooting complained of, and not on said Monday,"** and that the shooting of Bryant by Dodson **"was entirely separated in point of time, and occasion, from Bryant's discharge from the defendant's employment."** Is it not inconceivable that the defendant would have made these admissions, which in themselves plainly admit that the Federal Act does not apply, unless it was believed that merely pleading the act is sufficient to bring this case under its operation. See our reply brief on motion to dismiss, p. 21 et seq.

Defendant appears to rely on mere averments without substantial foundation for jurisdiction.

Our contention has been, and now is, that it appears from the record that no real Federal question is involved. Such question certainly cannot exist in this case unless Bryant was in defendant's employment at the time of the tragedy. The evidence shows that he was not in its employment, and the state courts have so found, and on the defendant's demurrer to the evidence, could have made no other finding. If this is true, the Federal Statute has no application, and this court has no jurisdiction except under the Federal Act. We fully appreciate, however, that this court is the ultimate and supreme arbiter of its own jurisdiction.

It was said by this Court in Sawyer v. Piper, 189 U. S. 157, 47 L. Ed. 759:

> "A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. Millinger v. Hartupee, 6 Wall. 258, 18 L. Ed. 829; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 87, 35 L. Ed. 943, 946, 12 Sup. Ct. Rep. 142, 145. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment; otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." And see Wabash R. Co. v. Hayes, 234 U. S. 90, 58 L. Ed. 1230.

III.

The Statements of Counsel Relating to When Bryant Was Discharged Are Misleading, and Not According to the Evidence in the Record.

It is admitted by defendant's counsel, that Bryant had been discharged from defendant's service before he was shot, but the evidence of Dodson and Crance are entirely ignored, and a strenuous effort is made to show from the evidence, that Bryant was not discharged until Monday morning, and very shortly before he was shot, and that he was shot before he had a reasonable time to leave the defendant's premises, and that therefore, the Federal Statute applied until Bryant had reasonable opportunity to leave. This is an ingenious effort of defendant's counsel to bring this case under purview of the Federal Statute, that was not thought of, or intimated at the trial, and is not mentioned in its statement of defense, R. 25, nor in any one of its grounds of demurrer to the evidence, and should be given no consideration. Our Virginia Statute, Code 1919, Section 6117 provides as follows:

> "The party tendering a demurrer to the evidence shall state in writing specifically the grounds of demurrer relied on, . . . nor shall any ground of demurrer not thus specifically stated, be considered . . . ."

The provisions of the statute are mandatory, and it can hardly be pretended that defendant's fifth ground of demurrer (R. 161), is sufficient to enable it to rely on its claim here, that Bryant, though discharged from defendant's service, was still under the limitations and provisions of the Federal Statute until he had had a reasonable time to leave defendant's premises, and was shot by defendant's foreman before that reasonable time had elapsed.

It is true that in the plaintiff's declaration, it is averred in substance, that Bryant, when he began his day's work for the defendant, as its servant, on the morning of August 31, 1925, was discharged by defendant's foreman from its employment, and that Bryant did not, after he had been discharged, leave the defendant's premises, immediately, or, made some excuse for not leaving, and was shot by the defendant's forman (R. 19 et seq).

The shooting complained of happened in the presence of defendant's section force, and neither the plaintiff nor his attorneys had any intimation, at the time of the filing of the declaration, that Bryant had been discharged from defendant's service, on the Saturday before August 29, 1925. This evidence was not known until it developed in the testimony of defendant's foreman, Dodson, when his deposition was taken at the Virginia prison, in Richmond, shortly before the trial.

Defendant's attorney has presented this case upon the theory that the plaintiff is confined strictly to is allegations in the declaraion, with reference to the time when Bryant was discharged, and has

quoted the testimony of a number of witnesses for the plaintiff tending to support the allegations in the declaration, that the shooting followed closely after the discharge. The testimony of defendant's own witness, Mr. Crance, is entirely ignored. He said in chief (R. 141):

> **"I said to (Dodson) tell him (Bryant) to leave and draw his money; I don't want him (Bryant) any longer, if he don't want to work."**
>
> **Q "That was on Saturday afternoon?"**
>
> **A "Yes, sir."**

Then immediately followed the cross examination of Mr. Crance, and the first question on cross examination was:

> **Q "You, in fact, discharged him (Bryant), or directed his discharge?"**
>
> **And Mr. Crance answered, "Yes, sir, I directed it."**

The inference from this testimony of the defendant's witness, on the demurrer to the evidence, is that Dodson did what he was directed to do by his superior, and discharged Bryant, on Saturday, before the shooting. Dodson in his testimony shows that he did just what he had been directed to do by his superior, Mr. Crance, and discharged Bryant, on Saturday. He was asked (R. 84):

Q "Do you know whether Mr. Bryant had been discharged from the C. & O. service when he was mortally wounded?"

Defendant's counsel objected to the question as follows:

BY MR. PERRY: "This question, and any answer, is objected to, on the ground that the question is leading; that the witness is asked to state a conclusion of law, and that the witness' statement cannot bind the defendant in this case, since they are made long after the occurrence."

Overruled. Defendant excepts.

A "Yes, sir."
Q "When was he discharged?"
A "He was discharged on Saturday."

BY MR. PERRY: "Same objection."

Overruled.

Q "On what day was the shooting?"
A "On Monday morning."
Q "On the following Monday morning?"
A "Yes, sir, the following Monday morning."

Q "Who discharged him from the C. & O. service?"
A "I did myself."

It is claimed by defendant's counsel, in his statement of facts, that the evidence of Dodson, was evidence that was not admissible under the declaration, on the ground of variance, and therefore, cannot be considered, and ought not to have been considered by the state courts. Remarkable to say, it is contended by defendant's counsel, that upon defendant's objections quoted above, that Dodson's testimony as to the discharge of Bryant on Saturday should be disregarded, on account of variance. It can hardly be pretended that the objections and exceptions made by the defendant, can be given any consideration. In order to give such objections, life and effect, they must have been embodied in a bill, or certificate of exception, signed by the trial Judge. See our reply brief on motion to dismiss, p. 13. The objections, however, are not made upon the ground of variance. The question of variance is not mentioned. The objections are: (1) **that the question is leading,** (2) **that the witness is asked to state a conclusion of law,** (3) **and that the witness' statements cannot bind the defendant in this case since they were made long after the occurrence.** If these objections had been properly embodied in the record, could they be considered of any merit? They are not founded on variance from the allegations of the declaration. Are they not, in fact, frivolous?

It is not pretended by defendant, that any motion was made by it to strike out the testimony of Dodson on account of variance. Its sole reliance for rejecting Dodson's testimony, as to the time of discharge of Bryant, is founded upon its above loose objections merely noted in the stenographer's copy of the evidence.

If defendant had made proper objections to Dodson's testimony on account of variance, such objections could hardly be sustained. Variance must be material and substantial. It is where one case is alleged and another is proven. Can it be claimed that that is true here? There is certainly no material variance as to the character, or merits of the case. The alleged variance only relates to a question of time. It is not alleged by the plaintiff that the shooting was done until after Bryant had been discharged from the defendant's employment. The testimony of Dodson only shows that the interval of time between the discharge, and the shooting is longer than the time mentioned in the declaration. This does not make, or tend to make, a different case on the merits. But if it did, **there was no objection to it, and no motion to strike it out, and it stands here in the record just as if it had been alleged in the declaration.** If objection had been made on account of variance, the plaintiff or the trial court would have had an opportunity to avail themselves of the Virginia Statute, 6250, of Va. Code, 1919, relating to variance, which provides as follows:

> "If, at the trial of any action or motion, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. **Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case.**" (Italics supplied.)

If an objection on account of variance had even been made, after all the evidence was in, the court in this case could, and should have given judgment on the facts proven, without any amendment under the terms of the statute.

If there was a variance, as claimed by the defendant, it was waived by the defendant.

As said by the Virginia Court in Conrad v. Ellison-Harvey Co., 120 Va., at p. 462:

> "Parties are not permitted to make one objection in the trial Court, and a different one in the appellate Court, but are regarded as having waived all objections, save those specially pointed out."

And as said in Burks Pl. & Pr. (2d Ed.) p. 588, the leading authority on common law practice in Virginia:

> "If, however, notwithstanding the variance, no objection was made to the admissibility of the evidence, and no motion was made to exclude on account of supposed variance, the objection must be considered on appeal as waived."

See here our reply brief on motion to dismiss from p. 1 to 13 inclusive.

IV.

It Is Admitted by Defendant That Bryant Had Been Discharged From Its Service in Interstate Commerce, But It Claims That the Employers' Liability Act Controls, Because He Was Shot Before He Had Been Given a Reasonable Time to Leave the Defendant's Services After His Discharge.

Defendant's counsel relies, solely, on the question as to whether the Federal act extended to the parties, and controlled, until Bryant had been given a reasonable time to leave the service. Our contention, however, is, as we have above pointed out, and as shown in our former briefs, that Bryant was discharged from the defendant's service two days before the shooting occurred, and that even if he

was not actually discharged until shortly before he was shot, as claimed by defendant, that the act has no application. If the discharge, and the shooting were close together, does that operate to bring this case under the Federal Statute? And should it not be kept in mind that, that Statute was enacted for the benefit of railroad employees, and not for the benefit of the railroad employers. And here the defendant is claiming the benefit of the statute to defeat the recovery in this case, after its relations with its employee had ended, **and had been ended by its own act.** Is not this whole contention an anomalous one?

Is it not true that the very moment that Bryant was discharged that the contractual relations of master and servant between the defendant and Bryant ceased to exist? But the relation of master and servant is the relation that must exist to bring a case under the operation of the Federal Act. This appears to be self evident, we believe, from the very terms of the act itself. See the Statute quoted in our opening brief on motion to dismiss at p. 8.

Our Virginia Court said in the case of A. C. L. R. Co. v. Treadway's Admrx., 120 Va. 735 at p. 744, that under the Federal Employers' Liability Act, "the relationship of employer and employee is the same as that of master and servant. Therefore, when the relationship of master and servant ceases, the servant is no longer engaged in interstate commerce." See C. & O. Ry. Co. v. Harmon's Admr., 189 S. W., 1135 (Ky.).

When Bryan was discharged the contractual

relations between him and the defendant terminated. It is true that a section hand employed in the service of an interstate carrier, and in interstate commerce, is treated not only as in the employment of the carrier while engaged in work, but also in going to and in leaving his work, on the employer's premises. The going to and leaving the work are, however, necessarily incident to the employment and service. This was contemplated in the employment, and part of the employment contract. The cases relied on by defendant apply to servants going to and from their master's work. This, however, only applies during the relationship of master and servant. If the servant while at work is discharged, the relationship of master and servant terminates, and ends at once. The same principle, clearly, does not apply as in a case where a man had completed his day's work, and as he left the work for the day, was injured. In the one the relation of master and servant existed, but in the other, that relation had ended; had terminated upon the discharge. A servant in going to or leaving his work, on the premises of the master, is on the master's premises by contractual right. Leaving the work is a necessary incident, just as going to work is a necessary incident to the employment. A servant, however, who has been discharged by his master, stands in no contractual right, as to his late master. Their relations have been dissolved, they have become strangers. The servant, when he is discharged, at once becomes a mere licensee to use his late master's premises to

leave the employment, and if he does not leave promptly, when discharged, and directed to leave, he at once becomes a trespasser.

When Bryant was discharged, that very moment, he had, figuratively, stepped from the Federal jurisdiction, and stood alone within the state's jurisdiction. It can hardly be conceived that the Federal Act could apply for any purpose, after the relation of master and servant had ended.

It is admitted by the defendant, that it had discharged Bryant from its employment, yet, it claims that he was still in effect in its employment after the relation of employment had ended. This claim is made to defeat the plaintiff's right to recover. Is not the defendant estopped to set up and make such claim? Is not this pretention of defendant entirely without merit, and frivolous? **How was it possible for Bryant to have been in the defendant's employment, and out of its employment, at the same time?** And yet on this the defendant founds its case under the Federal Statute.

A common carrier railroad may be engaged, both in interstate and intrastate commerce, and if its servant employed in interstate commerce turns aside to do any kind of work in intrastate commerce, the very moment that he turns and begins work in intrastate commerce, the Federal Employers' Liability Act ceases to govern.

In the recent case of Foreman etc. Bank v. Grand etc. Ry. Co., a conductor on an interstate train was repairing a latch on an intrastate car in

his train, and was injured, and the Illinois courts held that he was not entitled to relief under the Federal Employers' Liability Act, because, at the moment of the injury, he was engaged in intrastate commerce; and on application to this court a writ of error was denied. 73 L. Ed. 302, number 639, on docket of this court at October term, 1928.

From analogy, did not Bryant's relations to the defendant, under the Federal act cease **the very moment** that he was discharged; and is not the state law alone applicable?

It was obviously, we believe, a question for the jury, or for the court on the demurrer to the evidence, to determine whether the relation of master and servant had ended at the time of the shooting. And the court is again referred to the case of Northwestern Union Packet Co. v. McCue's Admrx. 84 U. S. 508, as a case in point, and the opinion in that case is quoted in full in our brief opposing writ of certiorari, p. 9 et seq.

And we also again refer the court to the case of Pennsylvania Co. v. Marion Donat, 239 U. S. 49. The question in that case was whether the plaintiff at the time he was injured was engaged in interstate commerce. The defendant requested the District Court to charge that the plaintiff was not engaged in such commerce, at the time of the accident, and could not recover. The trial court refused the request and referred the question to the jury, which found for the plaintiff, and judgment was entered on the verdict. The District Court was sustained by the Circuit Court of Appeals, and the

case was brought to this court on writ of error. There was a motion under Rule 6, Section 5 to affirm the judgment. In sustaining the motion to affirm, this court said:

> "The question presented upon this writ of error is so frivolous as not to need further argument, and the motion to affirm the judgment below must be granted." See our brief opposing writ of certiorari, pp. 6 and 7.

V.

Three Issues Were Made and Determined in the Trial Court.

First: **Was Bryant in the employment of the defendant in interstate commerce at the time he was shot?**

Second: **Whether, or not, the defendant's foreman in the scope of his employment wrongfully shot and mortally wounded Bryant.**

Third: **Whether, or not, the death of Bryant was caused by the negligence of the defendant in putting a man in charge of its section force as foreman, when it knew, or ought to have known, by the exercise of ordinary care, that this man was an unfit and dangerous person to be given such a position.**

The first issue was made on the defendant's special plea (R. 22), and the plaintiff's replication

thereto (R. 24). It was admitted by the plaintiff, that the defendant was engaged as a common carrier in interstate commerce. The question then, whether or not, the case was controlled by the state or the Federal Statute, depended solely on whether or not Bryant was in the defendant's employment, in such commerce, at the time he was shot.

As said by this Court in the case of N. C. R. Co. v. Zachary 232 U. S. 248-256; 58 L. Ed. 591-594:

> "In order to bring the case within the terms of the Federal Act, defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appear, the Federal Act governed, to the exclusion of the Statutes of the State."

The general issue, not guilty, was plead by the defendant (R. 21), and the second issue was made on the first count of the declaration (R. 19), and the third issue on the second count of the declaration (R. 20).

All these issues were questions of fact for the jury, but the defendant demurred to the evidence, and the case stood, **even stronger for the plaintiff,** than if a verdict for the plaintiff had been found by the jury, and on the demurrer the trial court found all these issues for the plaintiff, and that finding was affirmed by the Supreme Court of Appeals of Virginia (R. 188).

We admit, however, that if this case is governed by the Federal Act, that the defendant cannot be held liable on the second issue, for the wrongful act charged in the first count of the declaration, because that act only applies to NEGLIGENCE of the defendant. **But not so, with the third issue, made on the second count of the declaration, for the law is well settled that "a plaintiff is entitled to recover, if he proves any one count, although he may fail to establish the others."** 31 Cyc. 675. The second count is founded on the **negligence** of the defendant and comes under the Federal Act, if that act governs. It is true that the allegations of the second count are not such as to bring it under the Federal Act, but that is immaterial if the evidence makes out a case under the Act.

The Court, on the demurrer to the evidence, could have given judgment for the plaintiff under the Virginia Statute, Va. Code, Section 6250, **supra,** p. 12, just as if facts had been pleaded that would bring this second count under the Federal Act. The concluding clause of that section provides as follows:

> "Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case."

The Court under this statute could have directed the jury to find the facts, and then could have given judgment on the facts. But the defendant, by its demurrer to the evidence, took the case away from the jury, and the court on the facts found for the plaintiff. In this second count, but one right to recover is asserted, and both under the State and the Federal Statute the Court had jurisdiction. The court gave judgment for the plaintiff, and whether this case is governed by the State, or the Federal Statute we submit that the judgment should stand.

Judge Burks, in delivering the opinion of the Virginia Court in the case of Shumaker's Admx. v. A. C. L. R. Co., 125 Va., 393, at p. 397, said:

> "The trial court, however, clearly had jurisdiction under the Virginia Statute, if the injury was inflicted upon the plaintiff while engaged in intrastate commerce, and the Federal Statute also gave it jurisdiction if the plaintiff's intestate was, at the time of the injury, engaged in interstate comerce, so that whether he was engaged in intrastate commerce, or interstate commerce, the state court had jurisdiction. It was not necessary to mention in the declaration under which of the acts the plaintiff sued. It was sufficient if the facts alleged brought the cause of action within the terms of either statute." Citing Vickery v. New London etc. R. Co., 87 Conn. 634; 89 Atl. 277-279, and Mo. etc.

R. Co. v. Wulf, 226 U. S. 570; 57 L. Ed. 355.

In the case of Wabash R. Co. v. Hayes, 234 U. S. 86; 58 L. Ed. 1226, the plaintiff stated his case so as to indicate that he was claiming his right to recover, only, under the Federal Act, and the evidence showed that the injury did not occur in interstate commerce, and the court gave judgment for the plaintiff as made out by the evidence. Mr. Justice VanDevanter, in delivering the opinion in that case, said:

> "Instead of presenting his case in an alternative way, the plaintiff so stated it as to indicate that he was claiming only under the Federal Act. And when the proofs demonstrated that the injury arose outside of interstate commerce, and that therefore no recovery could be had under the Federal Act, the court was confronted with the question whether the declaration could be amended, or regarded as amended, to conform to the proofs. Holding that this could be done, the court treated the mistaken allegation that the injury occurred in interstate commerce as eliminated. Therein the court merely gave effect to a rule of local practic, the application of which was not in anywise in controvention of the Federal Act." Citing Second Employers' Liability Cases, Mondou v. New

> York, N. H. & H. R. Co., 223 U. S. 56-57; 56 L. Ed. 348, 349; 38 L. R. A. (N. S.) 44, and then said, "it follows that the contention that the defendant was denied a right or immunity to which it was entitled under the Federal Act is not only untenable, but so devoid of color as to furnish no basis for this writ of error." Citing Sawyer v. Piper, 189 U. S. 154; 47 L. Ed. 757.

Our Virginia Appellate Court is governed by a very practical and liberal statute, Section 6331, of the Virginia Code, 1919, which in so far as pertinent here, is as follows:

> "No judgment or decree shall be arrested or reversed . . . for any defect, imperfection, or omission in the pleadings, which could not be regarded on demurrer; or for any other defect, imperfection, or omission in the record, or for any error committed on the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached."

There is another and stronger reason why the judgment on the second count should stand if the court should find that the Federal Act governs. The defendant in its special plea stated facts, that

if proven, bring this case under purview of the Federal Employers' Liability Act and thus aided the second count of the declaration, and supplied the allegations that bring the case under the Federal Act. The case by the defendant **pleading over** stands on the second count, just as if it had been set out in this count, that the defendant is a common carrier by railroad, engaged in commerce beween the several states, and that Bryant was killed while he was in the employment of said defendant, in such commerce. The issue was not made alone on the facts stated in the second count of the declaration, but was also on the facts stated in defendant's special plea. And that plea must be taken as amendatory of the declaration, if the Federal Act governs.

It is said in 16 Ency. of Pl. & Pr. p. 580:

> "When a declaration omits material allegations which are supplied by the plea, the omission is thereby cured."

In 31 Cyc. p. 714 it is said:

> "If a necessary allegation is omitted from a pleading, and the missing allegation is either alleged or admitted by the pleading of the adverse party, the defect is cured."

It was said by the Illinois Court in the case of Wallace v. Curtiss, 36 Ill., 156, and approved by the same court in Rubens v. Hill, 231 Ill. 523, 72 N. E. 1127:

> "The pleas cured the omission . . . The issues were not alone on the facts stated in the declaration, but upon the agreement stated in the special plea, and they may be taken as amendatory of the declaration, of the issue, and verdict, in order to favor the justice of the case." See United States v. Morris, 10 Wheat. 246, Simonton v. Winter, 5 Pet. (U. S.) 141, 8 L. Ed. 75.

The Connecticut Court said in the case of Vickery v. New London Northern R. Co., 89 Atl. 277 at p. 280:

> "The trial court erred in withholding from the plaintiff the desired leave to amend, for the reason assigned, but that error can be of no help to him here. The complaint remained unamended and barren of allegations showing the application of the Federal statute. The omitted allegations of the third defense, however, brought the pertinent facts upon the record, and supplied the absence of them in the complaint. Brooks v. Brooks, 1 Sid. 184; U. S. v. Morris, 10 Wheat, 246, 286, 6 L. Ed. 314; Slack v. Lyon, 9 Pick (Mass.) 62, 65; Rubens v. Hill, 213 Ill. 523, 537, 72 N. E. 1127; Hedderly v. Downs, 31 Minn. 183, 186, 17 N. W. 274. This doctrine of express aider is one of which we have ap-

proved as resting upon principles of justice. Wall v. Toomey, 52 Conn. 35, 38. Under its application the complaint, defective though it was for lack of allegation of material facts, had its defects in that respect cured, and the missing allegations supplied by their subsequent averment by the defendants and admission by the plaintiff." See 1 Chitty's Pleading, 7th Ed., 703.

It should also be kept in mind that **"on a demurrer to the evidence, the court does not look critically into a variance between a declaration and proofs."** (Italics supplied.) 6 Ency. Pl. & Pr. 404. At common law many faults were cured by a verdict, or by judgment on demurrer to the evidence. It is said in 1 Chitty's Pleading (7th Ed.) 705: "The expression **cured by verdict** signifies that the court will, after a verdict presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proved at the trial." And our statute of Joefails covers a multitude of faults, Sec. 6331 of Virginia Code, quoted supra page 25; and Section 6104 of Virginia Code, directs that "The court shall at every stage of the proceedings, disregard any error, or defect, which does not affect the substantial rights of the parties." See So. Ry. Co. v. Finley, 127 Va. 132, at p. 138.

It is not questioned here, or pretended by the defendant, that the second count of the declaration

does not state a good case. See Northern etc. R. Co. v. Mares, 123 U. S. 721; 31 L. Ed. 296. And, "a plaintiff is entitled to recover, if he proves any one count, although he may fail to establish the others." 31 Cyc. 67
Under this count it devolved on the plaintiff to prove two facts, first, that the defendant was negligent in putting Dodson, an unfit and dangerous man, in charge of the section force, and second, that Dodson, in the course of his employment, shot and mortally wounded Bryant.

VI.

Was Dodson an Unfit and Dangerous Person to be Placed in Charge of Defendant's Section Force?

A number of witnesses for the plaintiff testified on this subject, and in presenting their evidence we will be governed by the rule on a demurrer to the evidence, and state the testimony of witnesses in the most favorable light, for the plaintiff.

G. T. Wright said (R. 32) **"he (Dodson) was a high-tempered man, and he was a man that I wouldn't work under . . .** and I wouldn't like to work with him or under him . . . you couldn't suit him in no way you would do your work. And (R. 33) said, "he was a hard man to get along with, and of a **peculiar nervous and irritable disposition."** And (R. 34) said, "that he couldn't get along with men."

Samuel J. Wright said (R. 49), referring to Dodson, "he was a man like this, he would fly up,

HE WAS KINDA FLIGHTY, and would fly up where I didn't think he had any business doing it . . . THEY SAY THERE WAS SOMETHING WRONG WITH HIM, but I don't know"; and this witness said that this was Dodson's general reputation (R. 51).

John L. Price said (R. 73), about Dodson, "he was considered a quick tempered man, he was very quick in temper, he would take up little things, sometimes, that possibly wouldn't amount to anything much, he had that disposition and he was **quick or nervous, or something. I don't know what the trouble really was, but he would fly off at little things** that possibly wouldn't amount to anything much"; and (R. 74) said, **"he would fly up for no reason for it, lots of times,"** and that, this was Dodson's general reputation.

E. C. Thompson said (R. 99), in referring to Dodson, "he was a pretty fiery man," and that the general reputation of Dodson was that "HE WAS A MIGHTY PECULIAR FELLOW."

C. B. Alfred said (R. 111) about Dodson's temper and disposition, **"he had a very mean one, he was a man that couldn't get along with nobody,** it looked like you (he) couldn't speak right (to) nobody he had working with him, and he had a way that nobody liked, he didn't know how to speak to you when he talked to you"; and said that this was Dodson's general reputation.

Frank Alfred said (R. 113), that Dodson "would get mad at little or nothing," and that this frequently happened; and on cross examination

said (R. 114), "he would get mad with the men up there, and wouldn't speak to nobody, he just would get mad at anything."

William M. McDowell said (R. 105), about Dodson, " as far as I knowed of him, he was a kind of impassioned, very quick, it didn't seem to take very much to throw him out of passion, HE WAS NERVOUS OR SOMETHING OF THE KIND." And this the witness said was generally known in the community.

The question, however, is, did the defendant know what manner of man Dodson was, when it placed him in charge of its section force, as a substitute for Long, who was its regular foreman. Dodson was placed in charge by Long (R. 145, 150) with the approval of Mr. Crance (R. 139, 141). Dodson and Long lived together. They "batched" together in Dodson's cabin, and lived apart from their families. Long full-well knew the character of man that Dodson was. He knew that Dodson carried a pistol, a serious offense in Virginia, and Long knew that Dodson was "a **nervous and high tempered man, and dangerous, and liable to shoot any one about him.**" Long said in the presence of Dolph M. Wright (R. 124) that "he (Dodson) heard a noise, and that he was kinda nervous and scary like, and that he just shot through the window," and said that this was before Bryant was shot. Long said in the presence of Taylor Thompson (R. 125-6), a week or so before Bryant was shot, "that Dodson got up one night, he heard a racket around the house, and he shot two or three

times, maybe three, through the screen on the window, and he said "THAT IT WAS DANGEROUS FOR A MAN TO BE AROUND THE HOUSE OVER THERE," that Dodson would just shoot whenever he heard a racket, and that he got up that night and shot through the screen.

Long said in the presence of Samuel J. Wright (R. 128) in referring to Dodson, "THAT IT WAS REALLY DANGEROUS THAT THE MAN (DODSON) WAS NERVOUS, AND IT WOULDN'T DO FOR ANY ONE TO FOOL AROUND WHERE HE WAS AT" (R. 128); and Long said in the presence of Samuel J. Wright in referring to Dodson (R. 130), **"he is a nervous man . . . that he was nervous and had been shooting up there,"** referring to the cabin where Long and Dodson lived; and Long further said in the presence of this witness (R. 131), "HE (DODSON) WAS NERVOUS AND REAL DANGEROUS," and Samuel J. Wright said that Dodson (R. 131), **"would curse the other men."** Long said in the presence of W. M. McDowell (R. 134), "that they heard a racket up at the house one night, and Mr. Dodson got up and shot through the screen window, AND THAT IT WOULD BE DANGEROUS FOR ANYBODY TO FOOL AROUND WHERE MR. DODSON WAS, THAT HE WAS NERVOUS, AND THEY WOULD BE LIABLE TO BE SHOT"; and Long further said (R. 135), "THAT IT WAS DANGEROUS FOR ANY ONE TO FOOL AROUND WHERE HE WAS, BECAUSE HE WAS NERVOUS AND LIABLE TO SHOOT."

That Dodson carried a pistol is an admitted fact in this case, in violation of the law of the State, and used it while in charge of the section force in shooting Bryant. Long and Dodson lived in the closest relation; Long admitted that he knew that Dodson carried a pistol, and said (R. 157), **"he carried it himself, I did not permit him to do it,"** and said, **"I suppose he carried it to protect his own self."** Long was bound to have known the reputation of Dodson. He certainly must have known what the other section hands knew, and that according to reputation, "THERE WAS SOMETHING WRONG WITH DODSON," that "HE WAS KINDA FLIGHTY, HIGH TEMPERED, AND NERVOUS," and "**had a very mean reputation as to temper and disposition.**" Shortly before Bryant was shot, he said "THAT IT WAS REALLY DANGEROUS THAT THE MAN (DODSON) WAS NERVOUS, AND IT WOULDN'T DO FOR ANY ONE TO FOOL AROUND WHERE HE WAS AT"; that "IT WAS DANGEROUS FOR ANY ONE TO FOOL AROUND WHERE HE WAS BECAUSE HE WAS NERVOUS AND LIABLE TO SHOOT, AND THAT HE WAS NERVOUS AND REAL DANGEROUS." This is what the defendant knew when it put Dodson in charge of its section force, of which Bryant was a member. This evidence showing what the defendant knew about Dodson, is admitted, every word of it, on defendant's demurrer to the evidence, and every inference that can be drawn therefrom. The inference is, that the defendant

knew of the dangerous character, and unfitness of Dodson, and that he went armed with a pistol, when about his work. The fact that Dodson shot Bryant under the circumstances appearing in the record, certainly makes it clear that Dodson was an unfit and dangerous man to have been put in charge of defendant's section force, and knowing Dodson, as Long did, it must be inferred on the demurrer to the evidence that he was bound to have learned, and to have known the real character of the man. There is always something about a man's actions and conduct that reveals his true character.

Is it not evident that a jury might have found from this evidence, that the defendant knew that Dodson was an unfit and dangerous person to put in charge of its section force, and that he was liable to do some one under him in the service serious personal injury? This was found by the state courts on the demurrer to the evidence, and has been finally settled. As said by Judge Burks in the opinion of the Supreme Court of Appeals of Virginia (R. 164), "on a demurrer to the evidence, the demurrant is taken as admitting all inferences that a jury might fairly draw in favor of the demurree from his evidence. If an inference favorable to the demurree might be fairly drawn from any portion of his evidence, though that evidence was not entirely harmonious and consistent, the jury may draw it, and whatever inference the jury might have fairly drawn, the court must draw."

If Dodson, in the course of his employment, shot Bryant, then there can be no question about the defendant's liability.

VII.

Did Dodson, in the Course of His Employment by Defendant Shoot Bryant?

It is admittted by the defendant, that Dodson at the time of the shooting, was in its employment, and actually engaged in representing it at that time, as its section foreman. He represented his master, the defendant. He stood in the place of his master, and the master was liable for his acts, just as an individual would have been, if he had personally acted in the circumstances, as shown by the evidence here.

It was said by this Court in Ry. Co. v. Quigley 21 How. 202, 16 L. Ed. 73, that, **"for acts done by the agents of a corporation, either in excontractu or in delicto, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."** (Italics supplied.) This rule is broad, wise, and humane, and all of the well considered cases follow it.

Scope of employment is defined in Mechem on Agency (2nd Ed.) Section 1960, p. 1523, as follows:

> "In general terms, it may be said that an act is within the course of employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged in the master's business and be done, although

> mistakenly or ill-advisedly, with a view to further the master's interest, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account."

It cannot be claimed here by the defendant that the evidence in the record shows that Bryant was shot by Dodson wholly from some external, independent, and personal motive. Dodson, in fact, said (R. 93, 94), that he **"had no personal feelings, no ill-will or hatred against Bryant."**

What is the scope of employment is, ordinarily, a question of fact, and to be determined by a jury. It is said in 4 Elliott on Railroads (3rd Ed.) Section 1820, **"The scope of authority is as a rule to be determined from the facts of the particular case, and is usually a question of fact." (Italics supplied.)**

It is admitted by the defendant that Dodson as foreman had authority to hire and discharge servants of the defendant, and that he actually did discharge Bryant. Having this authority, Dodson had the authority incident to it, had the power to require Bryant to leave the premises, and if he refused, Dodson had authority to use force to eject him from the service. If Bryant, when discharged, refused to leave, he became a trespasser, and Dodson had implied authority to use such force as was

necessary to eject Bryant, and the defendant is liable if Dodson used more force than was necessary. The evidence shows that Bryant certainly refused to leave the premises, when directed. He refused to go at the point of a pistol leveled at him, at short range, which in itself was a common law assault. Dodson as foreman, besides authority to work his force, was vested with authority to look after the company's property in general. It is true that one of the defendant's witnesses, said (R. 147), that Dodson had no authority to eject trespassers, but that was a mere matter of opinion, but if evidence, it is waived on the demurrer to the evidence, because it is in conflict with pertinent and material circumstances in the case that are in evidence. First, that Dodson had full charge and control of the force of hands working on that section, and all necessary implied powers. But more than that, according to Mr. Crance, Supervisor of tracks, he had authority, among other things, to "LOOK AFTER THE COMPANY'S PROPERTY IN GENERAL" (R. 141). From these circumstances, it is obvious that he had authority to eject a servant who had been discharged and refused to leave, or who, after he had been discharged, came back and refused to leave after being directed to leave. Dodson, being in charge of the company's property in general, represented his master, the defendant, and had authority to do anything that the defendant, if it had been an individual, could do, and therefore had full authority to eject a trespasser who refused to leave the defendant's premises when directed.

It is said in 26 Cyc. 96, and 39 C. J. 91:

> "Upon his discharge, a servant must leave peaceably, whether or not the discharge was rightful . . . If he fails to leave, **or if after doing so returns,** he becomes a trespasser, and may be ejected by the master, although his wages may not all have been paid." See Merrell v. Coates, (Minn.) 111 N. W. 834, and Wilson v. Fowler Packing Co., 255 Pac. 1109. See also 20 A. and E. Ency. of Law 36. (Italics supplied.)

In the case of Rogahn v. Moore Mfg. etc. Co. (Wis.) 48 N. W. 669, referred to mistakenly in the opinion of Judge Burks (R. 174), as appearing in 43 N. W. 669. The facts were in substance as follows: The plaintiff, Rogahn, had been employed by the defendant's foreman, Beaman. He had the authority to engage and discharge men in the foundry department of the defendant. Beaman ordered the plaintiff to do certain work, and he refused to do it. Beaman forthwith discharged the plaintiff, and directed him to leave the shop at once. The plaintiff replied that he would do so **as soon as he could get ready.** The foreman was not satisfied with this, and to hasten the plaintiff out of the shop, forcibly pushed and kicked him, and he fell and broke his leg. It was urged by the defendant that the act of the foreman was not within the scope of his employment. The Court, in deciding for the plaintiff, said:

> "The foreman was authorized by the company to discharge workmen, and he might lawfully use such reasonable force as was necessary to remove the discharged men from the shop. This would be necessarily implied from the nature of the authority given him. There has been much discussion in the Courts as to how far the master is liable for the torts of his servant, and many nice distinctions have been made; but it is generally agreed that for the negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act was done by himself, the master is responsible. This principle is illustrated and applied in numerous cases found in the books."

The case of Jebeles & Colias Confectionery Co. v. Booze (Ala.) 62 So. 12, bears a close analogy to the Rogahn case, supra, and to the case at bar.

It is contended by the defendant that when Bryant went back to offer to work on Monday morning, and from a remark that he made that Dodson would probably "fire" him, that Bryant had not been actually discharged on Saturday. This, however, is a contention by the defendant that cannot be made on his demurrer to the evidence. Bryant, when he offered to work on Monday morning, stood, as we have pointed out in our reply brief on motion to dismiss, pages 18 and 19, as a licensee or invitee, and the defendant had the im-

plied right to tell him to leave, and if he refused to leave, to eject him, if doing so was necessary. If, however, Bryant, after being discharged, came back and started to work, and was told to leave and refused to go, he at once became a trespasser, and the defendant had implied authority to eject him as a disturbing agent. Dodson not only had this authority as foreman in charge of the force working under him, but as being in charge of the defendant's property, as we have pointed out supra.

It is said in Patterson's Railway Accident Law, Section 111:

> "The doctrine of most of the cases, however, is that whenever a railway servant is put in charge of any property of the railway . . . , that the servant is necessarily charged with the duty of protecting that particular property, and he is therefore for that purpose vested with implied authority to remove trespassers therefrom; and if he makes a mistake . . . by using unnecessary violence . . . the railway must be held liable." This doctrine was approved in Childress v. So. Pac. Co. 149 Pac. 309.
>
> "One who is lawfully in charge of premises and has required another to leave whom he has the right to require, may lawfully use so much force as is necessary to remove such other, after allowing him reasonable time to depart." 3 Cyc. 145-6. 5 C. J. 745. Montgomery's case, 98 Va. 840.

As we have pointed out, supra, the question as to whether Bryant acted within the scope of his employment is a jury question that was settled in favor of the plaintiff on the demurrer to the evidence.

It is said in Wiley v. Pere Marquette R. Co. (Mich.) 209 N. W. 59:

> "The question as to scope of authority is a question of fact, and not of law." And it was held in another Michigan case, Schulte v. Holiday, 19 N. W. 752, that "the question whether the servant is acting within the scope of his employment depends upon the facts as to which the finding of the jury is conclusive." See De Hawars v. Hennesey Bros., 137 Fed. 472, Balto. etc. R. Co. v. Pierce (Md.) 45 L. R. A. 527, Brough v. Fowle, 73 N. E. (Mass.) 851; Collins v. Wise (Mass.) 76 N. E. 667; 5 Fletcher's Cyc. Corp. p. 5212.

This Court, in the case of Denver etc. Ry. Co. v. Harris, 122 U. S. 610, 30 L. Ed. 1146, approvingly quoted from State v. Morris etc., R. Co., 23 N. J. L. 369, as follows:

> "If a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable **civ-**

> **iliter** for all torts committed by its servants or agents by authority of the corporation, express or implied. . . . The result of the modern cases is that a corporation is liable **civiliter** for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied." Citing Salt Lake City v. Hollister, 118 U. S. 256-60; 30 L. Ed. 176-8; New Jersey Steam Boat Co. v. Brockett, 121 U. S. 637, 30 L. Ed. 1049; National Bank v. Graham, 100 U. S. 699-702, 25 L. Ed. 750-1.

The case of Davis v. Merrill, 133 Va. 69, liberally quoted from by Judge Burks in his opinion (R. 172-3), was where a passenger in an automobile was shot by a servant of the Norfolk & Western Railroad and killed at Norfolk, Va. The automobile was running on Brambleton Avenue over which the N. & W. Ry. crosses. The gates were closed. The gate-man, the railroad company's servant, Ford, was called on by the chauffeur to open the gates. Some words passed between Ford and the chauffeur. Ford then opened the gates, and as the automobile started over the tracks, Ford shot three times at it, and one of the shots struck the deceased, Claudia Harrell, in the back and caused her death. There were two counts in the declaration, and one of the counts, as in the case at bar,

charged that the defendant, the Norfolk & Western Railway Company, was guilty of negligence in employing Ford, knowing that he was an incompetent and dangerous person, and that the shooting was done within the scope of his employment. There was a verdict for the plaintiff, and it was sustained by the trial court, and by the Supreme Court of Virginia, and it was held that the railroad company was liable on both counts, and the evidence of the incompetency and dangerous character of Ford was no stronger, we believe, than in the instant case. This case of Davis v. Merrill is specially referred to as a well considered case, and is directly in point.

VIII.

Defendant's Sole Reliance for Reversal is That This Case is Governed by the Federal Employers' Liability Act.

Learned counsel for the defendant has waived aside, or rather, has entirely ignored the rights of the plaintiff in this case under the second count of the declaration. He apparently treats both counts as resting on the same principle, that the acts charged in each count are wrongful acts, not provided for in the Federal act. Long, representing the defendant, with the approval of Mr. Crance, supervisor of tracks, the agents and representa- of the defendant, placed Dodson in full charge of the section force (R. 139, 141, 145, 150), although

Long full well knew the unfitness and dangerous character of Dodson. This, as we believe, was obvious negligence of the defendant that resulted in the death of Bryant. But this is not referred to, or even considered by learned counsel for the defendant in his brief on the merits. There is nothing in fact presented in his brief on the merits, that was not fully discussed in his briefs, not on the merits. And it can hardly be claimed by the defendant, with any confidence, that the cases of Davis v. Green, 260 U. S. 349, and Atlantic Coast Line R. Co. v. Southwell's Admr., 275 U. S. 64 have any practical application to this case, as made out on the second count of the declaration.

The arguments of defendant's counsel in his briefs are merely **De fumo disceptare,** and at best are as said by Suetonius, **"Arenae sine calce."**

IX.

Our Briefs Heretofore Filed.

We respectfully request that the brief that we filed opposing writ of certiorari, and our opening, and reply briefs on our motion to dismiss, may be read and considered as if they were fully set out in this, our brief on the merits of the case.

X.

In Conclusion.

We submit:

First, that the evidence clearly shows, on the demurrer to the evidence, that Bryant was not in

the defendant's employment in interstate commerce, at the time he was shot, that the Federal Employers' Liability Act does not govern, that this Court has no jurisdiction, and that the plaintiff's motion to dismiss ought to be sustained, and:

Second, that if the Federal Act governs, that a good case has been made out under the Act, on the issue made on the second count of the declaration and defendant's special plea, and that the judgment of the state court ought to be affirmed.

Respectfully submitted,

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Administrator of the Estate of M. L. Bryant,
Deceased.

R. B. STEPHENSON
and
CURRY CARTER,
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